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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-380**

**GERALD RANDALL WHITAKER and
EDWARD JOSEPH FITZPATRICK,**
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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No.

GERALD RANDALL WHITAKER and
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OPINION BELOW

The opinion of the Court of Appeals is reported as *UNITED STATES vs. WHITAKER*, 592 F.2d 826 (5th Cir., 1979). That opinion is set forth in its entirety in Appendix A to this Petition.

GROUNDS FOR JURISDICTION

- (1) The United States Court of Appeals for the Fifth Circuit filed its opinion affirming the convictions and sentences of Petitioners on April 4, 1979, and is appended as Appendix A hereto, pp. 1a-11a.
- (2) Petition for Rehearing and for Consideration En Banc was denied on August 6th, 1979, and is appended as Appendix B hereto, p. 12a.
- (3) This court has jurisdiction pursuant to 28 USC §1254.

QUESTION PRESENTED

Whether the Fifth Circuit's construction of 19 USC §1581(a), wherein random stops of vessels by Customs agents for document checks are upheld, absent reasonable suspicion or any finding that the vessel crossed the border or its functional equivalent, conflicts with the Ninth Circuit or is consistent with the Fourth Amendment.

STATUTORY PROVISIONS INVOLVED

19 United States Code Section 1581(a)

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United

States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act [19 USCS §§70, 1401 et seq., 1581 et seq., 1701 et seq.; 46 USCS §§60 et seq., 277 et seq.], or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

19 United States Code Section 1401(j)

CUSTOMS WATERS. The term "customs waters" means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

DESIGNATION OF RECORD AND TRANSCRIPT

The record on Appeal in the instant cause filed in the United States Circuit Court of Appeals, Fifth Circuit

consisted of the following: One (1) volume of pleadings, Two (2) volumes of transcript and One (1) brown envelope containing exhibits. In this petition, reference to volume and page are the same as originally designated in the Appellant's brief and represent the record as filed in the Appellate Court.

STATEMENT OF CASE

Petitioners, GERALD RANDALL WHITAKER and EDWARD JOSEPH FITZPATRICK, were charged by Indictment with the unlawful importation of marijuana, a Schedule I non-narcotic controlled substance in violation of 21 U.S.C. §§925(a) and 960(a)(1) and possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1).

Prior to trial Petitioners filed their Motion to Suppress the Evidence with an accompanying Memorandum of Law. On June 1st, 1977, an evidentiary hearing before the Honorable PETER R. PALERMO, United States Magistrate for the Southern District Court of Florida was held. The following evidence was adduced at this hearing:

On December 24th, 1976, at approximately 3:00 to 3:15 P.M., United States Customs Patrol Officers, SUTTON, JOHNSON, PATNODE and DUNN, while operating a Customs Vessel, observed a 41 foot Chris Craft Yacht proceeding in Biscayne Bay, Dade County, Florida. The yacht was observed coming from the

South and entering Biscayne Channel, Miami, from the oceanside. (Vol. 2, P. 7-9)

As to the vessel, the Customs Agents testified that the Florida Registration Numbers were not displayed on the bow of the vessel, but were up by the window on a placard. (Vol. 2, P. 9, 32, 52). The yacht further had no name or home port. (Vol. 2, P. 9, 31) The Agents testified that the hatch was shut, the curtains drawn and the Four (4) men aboard appeared to be dirty and unshaven or had beards. (Vol. 2, P. 9, 20, 52)

Each of the Customs Agents testified that the vessel appeared to be riding low in the water and pushing water as if heavily laden. (Vol. 2, P. 9, 10, 30, 48, 60) In addition, the Agents testified that they ran the name of the apparent registered owner — WILLIAM J. LAWSON — through their computer and it showed a "computer hit". (Vol. 2, P. 13, 18, Also see: Vol. 3, P. 5-10) However, the code was not utilized (Vol. 2, P. 13) and the actual owner of the vessel was the Petitioner, WHITAKER. (Vol. 2, P. 13)

Further testimony revealed that the Agents had not seen the yacht outside the United States, had no information that the vessel had been engaged in any trade outside the United States or that it had been outside the United States. (Vol. 2, P. 14, 44) The Agents admitted that they had not seen the vessel contact any other vessel off the coast of Florida and had no information prior to boarding that the vessel had contacted any other vessel out to sea. (Vol. 2, P. 43, 53) In fact, the

vessel was never seen more than two (2) miles from shore, (Vol. 2, P. 51) and what attracted the Agents' attention to the vessel was that "it was the only boat in the water." (Vol. 2, P. 8)

Approximately one half hour after their first observation of the yacht, the Customs Agents pulled alongside and boarded the vessel. (Vol. 2, P. 8) Once on board, one of the Customs Agents looked down on the deck and picked up what appeared to be Marijuana residue. (Vol. 2, P. 14, 56) A subsequent search of the vessel revealed 213 Bales of Marijuana weighing 9,098 pounds.

Petitioners submitted into evidence the applicable Florida Statutes and Federal Coast Guard Regulations which showed that the Registration Numbers could be displayed either on the bow of the vessel or forward half and that the Petitioners' vessel complied with State and Federal requirements. (Vol. 1, P. 68)

In addition, under Florida Law, the vessel was not required to have a name or home port, a fact admitted by the Agents. (Vol. 2, P. 31)

Said Motion was denied. Thereafter, Petitioners went before the trial court for a rehearing of the Magistrate's recommendation denying the Motion to Suppress. This Motion was denied, and the Magistrate ruling affirmed.

Jury trial commenced on July 6th, 1977 in the United States District Court, Southern District of Florida, with the Honorable Sidney M. Aronovitz, U.S. District Judge presiding.

The actual trial testimony reiterated that of the Motion to Suppress hearing.

The Jury returned a verdict of guilty as to all Defendants, on each Count. (Vol. 1, P. 60, 63)

On August 9th, 1977, the Petitioner, WHITAKER, was adjudicated guilty of Counts One and Two of the Indictment and sentenced to a term of Four (4) years imprisonment, on each Count, the sentence to run concurrent, and a special parole term of Two (2) years. (Vol. 1, P. 90) On August 25th, 1977, the Petitioner, FITZPATRICK, was adjudicated guilty of both Counts and sentenced to concurrent terms of Three (3) years, with a special parole term of two (2) years. (Vol. 1, P. 98)

Notice of Appeal was duly filed as to each Petitioner. (Vol. 1, P. 86, 103) The United States Court of Appeals for the Fifth Circuit filed its opinion affirming the convictions and sentences of Petitioners on April 4, 1979. Petition for rehearing was denied on August 6th, 1979. Thereupon, Petitioners file this Petition for Writ of Certiorari.

ARGUMENT

The Fifth Circuit's construction of 19 USC Sec. 1581(a), wherein random stops of vessels by customs agents for document checks are upheld, absent reasonable suspicion or any finding that the vessel crossed the border or its functional equivalent, conflicts with the Ninth Circuit's construction of 19 USC Sec. 1581(a) and is inconsistent with the Fourth Amendment.

In the instant case, Petitioner's 41 foot, state registered, pleasure vessel was first sighted two to three miles offshore (Vol. 1, P. 51) This vessel was then stopped in Cape Florida Channel after passing through Biscayne Bay (Vol. 1, P. 52).

The Fifth Circuit Court of Appeals upholds this stop without finding either that there was probable cause or reasonable suspicion to stop and search the boat or that the vessel had come from foreign waters. Instead the Fifth Circuit upholds this stop on the authority of 19 USC §1581(a) alone. In *United States vs. Freeman*, 579 F.2d 742 (5th Cir. 1978) the Fifth Circuit held that 19 USC §1581(a) provides sufficient constitutional authority for customs officers to randomly stop vessels for document checks in "customs waters." Customs waters are defined in 19 USC §1401(j) as to American vessels, as "the waters within four leagues (12 nautical miles) of the coast of United States." Thus the Fifth Circuit in *Freeman*, supra, authorizes the stopping of an American

vessel at any distance offshore from 0 to 12 miles for a random document check by customs officials under the aegis of 19 USC §1581(a).

The Fifth Circuit in the instant case expands this doctrine to authorize the stopping of a state registered pleasure vessel without probable cause, within the coastline, coastwise of customs waters. According to the Fifth Circuit in the instant case,

"We simply hold that 19 USC §1581(a) provides sufficient and constitutional authority for document checks of vessels sighted in customs waters."

The Fifth Circuit thus upholds the search absent probable cause or a finding that the vessel had crossed a border or its functional equivalent. Indeed, there were no facts in the instant case to justify a finding that the boat had come from foreign waters or crossed the 3 mile limit and thereby be subject to search under the functional "equivalent of the border" doctrine. *United States vs. Ingham*, 502 F.2d 1287 (5th Cir. 1974); *United States vs. Ivey*, 546 F.2d 139 (5th Cir. 1977).

The Fifth Circuit's broad construction of 19 USC 1581(a) which widens in *Whitaker* wholly conflicts with the Ninth Circuit's construction of this statute.

In the case of *United States vs. Tilton*, 534 F.2d 1363 (9th Cir. 1976) defendant's vessel was searched by customs

agents after it was loaded on a trailer. The Court held that a search without probable cause pursuant to 19 USC §1581(a) of a vessel in a harbor may be valid under the Fourth Amendment *as a border search* at the functional equivalent of the border or where there are articulable facts to support a reasonably certain conclusion by customs officials that the vessel had crossed the border and entered our territorial waters.

The Ninth Circuit, there opines,

"It is true that the statute grants broad authority for customs searches. However no Act of Congress can authorize a violation of the Constitution. *Almeida-Sanchez vs. United States*, 413 U.S. 266, 93 S.Ct. 2535, 97 L.Ed.2d 596, 602 (1973). Therefore we must inquire whether the customs agents' exercise of their authority was consistent with the Fourth Amendment's prohibitions of unreasonable searches and seizures."

The Ninth Circuit in *Tilton*, *supra*, remands the case for a determination by the trial court as to whether the vessel crossed the border. The Court, there, recognizes that one exception to the Fourth Amendment requirement of probable cause is a search at an international boundary of persons and vehicles coming into the United States. However, the Court does not authorize document checks of vehicles pursuant to 19

USC §1581(a) absent a finding that the vessel crossed a border or its functional equivalent. In *United States vs. Stanley*, 545 F.2d 661 (9th Cir. 1975) cert. den. 436 U.S. 917, 98 S.Ct. 2261 (1978) the Ninth Circuit fleshes out the analysis which is at the root of their conflict with the Fifth Circuit over vessel stops pursuant to 19 USC §1581(a). There, Defendant's vessel was first seen about 9 miles from the coastline and boarded forty minutes later. This search is upheld because it occurred at the border or its functional equivalent.

The Ninth Circuit decision in *Stanley*, *supra*, begins,

"The first issue is whether a customs search may be predicated on 1581(a) alone."

Undertaking a rigorous analysis, the Court determines that this Statute cannot validate searches which offend Fourth Amendment standards. The Ninth Circuit concludes,

"[5] By analogy, a search based solely on 19 U.S.C. §1581(a) is unreasonable if it sweeps more broadly than the Fourth Amendment allows. In the absence of probable cause or consent, it is unreasonable unless it falls within an exception to the Fourth Amendment prohibition against unreasonable searches and seizures. A border search has been held to be such an exception. *United States*

vs. Tilton, 534 F.2d 1363, 1364 (9th Cir. 1976); *United States vs. Solmes*, 527 F.2d 1370 (9th Cir. 1975); *United States vs. Ingham*, 502 F.2d 1287 (5th Cir. 1974); *Klein vs. United States*, 472 F.2d 847 (9th Cir. 1973)." Page 665

The Ninth Circuit thus explicitly applies the principles of *Almeida-Sanchez vs. United States*, 413 U.S. 266, 93 S.Ct. 2535, 97 L.Ed.2d 596 (1973), and *United States vs. Brignoni Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) to constitutionally limit the application of 19 USC §1581(a) to permit random document checks of vessels by customs officers absent probable cause *only* at the border or its functional equivalent.

The Fifth Circuit has consistently refused to do such and instead construes 19 USC §1581(a) to authorize random document checks of vessels sighted in "customs waters." It should be emphasized that "customs waters" are simply, all the seas off the coast out to twelve miles.

The mere sighting of a vessel in customs waters, absent any facts to indicate that the vessel crossed the three mile limit, has never been held to satisfy the requirements of the functional equivalency doctrine. *United States vs. Ivey*, 546 F.2d 139 (5th Cir. 1977); *United States vs. Solmes*, 527 F.2d 1370 (9th Cir. 1975).

In the instant case, the customs officers had no reason to suspect that the vessel had travelled in

foreign waters as the Agents had made no such observation and had no such information (Vol. 2, P. 14, 43, 44). In fact, the vessel, a 41 foot Chris Craft, was never seen more than two to three miles offshore. The Customs Agents had no information that the vessel had contacted any other vessel at sea and what attracted their attention to the vessel was that "it was the only boat in the water." (Vol. 2, P. 2) Thus the Fifth Circuit explicitly does not validate the stop in the instant case as a border stop or under the "functional equivalent of the border doctrine." Nor is there probable cause to stop. Instead, the Fifth Circuit holds that Customs agents may stop a vessel for a document check absent probable cause, reasonable suspicion or even suspicion at places other than the border or its functional equivalent. Sighting of the vessel within "customs waters" suffices to authorize a document check.

Under the decision in the instant case, individuals in vessels lose their Fourth Amendment protections as soon as they venture out of the harbor. The dimensions of this decision's effects are overwhelming.¹ In 1977, at the time of the *Whitaker* stop it is estimated that there were 10.5 million recreational boats owned in the United States, including 980,000 inboard boats, including auxiliary sailboats; 6,200,000 outboard boats; 840,000 sailboats; and 2,495,000 auxiliary craft.² Furthermore,

¹ See statistical information in Appendix C including *Standard & Poors*, Industry Survey, October, 1978, Pages 11 & 12 on boating.

² *Information Please Almanac*, Atlas & Yearbook, 33rd Edition, Viking Press, N.Y., Page 319.

it is estimated that approximately 400,000 boats are added to the nation's waterways each year.³

In a recent opinion by the Fifth Circuit, *United States vs. Whitmire*, 595 F.2d 1303 (5th Cir. 1979), Circuit Judge Alvin B. Rubin concurs in the result reached by the Court but dissents from the analysis employed to justify the vessel search pursuant to 19 USC §1581(a) because,

"These passages have potentially dangerous impact on Fourth Amendment rights."

Judge Rubin eloquently states in his concurring opinion and thus points out the dilemma of the Fifth Circuit's opinions in this area,

"Those who sail our nation's waterways are entitled to the same protection as those using its roads or airspace: freedom from unreasonable stops and seizures."

The conflict in the law between the Fifth and Ninth Circuit Courts of Appeal exasperated in the instant case is ripe for consideration by this Court.

This conflict concerns the constitutionality of the Fifth Circuit Court's application of the Congressional

³ Ibid.

Statute controlling stops and searches of vessels off our seacoasts. It is fundamentally unjust for a United States citizen in a vessel off the coast of California to have substantially different Fourth Amendment rights than a citizen in a similar vessel off the coast of Florida. This Court should grant the Writ of Certiorari sought in the instant case in order to review and resolve the conflict in this important area of constitutional law.

CONCLUSION

WHEREFORE, Petitioners respectfully request this Honorable Court to grant the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing were mailed this ____ day of _____, 1979, to Hon. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and one true copy was mailed to the United States Attorney's Office, 300 Ainsley Bldg., Miami, Florida 33132.

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APPENDIX "A"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERALD RANDALL WHITAKER and
EDWARD JOSEPH FITZPATRICK,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 77-5526

April 4, 1979.

Appeals from the United States District Court for
the Southern District of Florida.

Before COLEMAN, GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

Appellants Gerald Whitaker and Edward Fitzpatrick appeal their convictions of marijuana importation and possession with intent to distribute.¹ Each complains about the stop and warrantless search of their vessel and a reference at trial to their silence after arrest and

¹ A third defendant, Donald Gaetano, was also convicted but has not appealed.

receipt of *Miranda* warnings. Fitzpatrick additionally urges that a co-defendant's out-of-court declaration was impermissibly used against him and that there is insufficient evidence to sustain his importation conviction. Rejecting the former contentions and finding it unnecessary to reach the latter, we affirm.

I. *The Stop and Search.*

On December 24, 1976, United States Customs officers patrolling the waters around Miami, Florida, sighted a 42-foot yacht two or three miles off the coast, heading north toward land. As the boat neared Biscayne Channel, the officers noticed that it was "riding low in the water" and making a big bow wake. The boat bore neither name nor home port designation and carried its registration numbers on a sign posted inside a window. Though the latter practice is normal for new boats, it is abnormal for a 15-year old boat such as this. The windows of the yacht were closed, the curtains drawn. Made suspicious by these curious circumstances, the officers radioed a request for a computer check on the boat's numbers. In the meantime, the customs boat followed the yacht into Biscayne Channel, observing that it appeared to be handling sluggishly, another indication of a heavy load. When the computer check turned up four possible "hits" with the name of William Lawson, the officers decided to board. They pulled alongside and advised the captain (Whitaker) that they would like to board and check identification. One of the officers smelled a strong

odor, and another thought he smelled marijuana. When they boarded and requested the registration, Whitaker merely shrugged. After an officer observed marijuana residue on the deck, the cabin door was opened, revealing 9,098 pounds of marijuana.

Appellants argue that the marijuana should have been suppressed as evidence because there had been neither (1) probable cause to stop/search, nor (2) sufficient evidence to make it highly probable that the vessel had come from foreign waters and was thus subject to search under the "functional equivalent of the border" doctrine. We need not address these contentions in light of our recent opinion in *United States v. Freeman*, 579 F.2d 942 (5th Cir. 1978), which ratified an additional basis for this stop.² In *Freeman* we reviewed the statu-

² We note that the recent Supreme Court decision, *Rakas v. Illinois*, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), does away with the notion of fourth-amendment standing as a separate analytic inquiry. Both appellants would have had "automatic standing" to challenge the search under the superseded precedent. Their standing or, as transmuted by *Rakas*, the preliminary substantive issue of whether each possessed, in the circumstances, an interest which the fourth amendment was designed to protect, went unlitigated below. Because of this procedural posture and because, even under *Rakas*, Whitaker as captain could perhaps assert sufficient protectable interests, we pretermitted the *Rakas* inquiry and proceed to a consideration of the legality of the search. We note in passing, however, that the fourth amendment has long been considered applicable to those upon boats. See, e.g., *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924); *Arch v. United States*, 13 F.2d 382 (5th Cir. 1926). Since the fourth amendment "protects people, not places," *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), implicit in these cases is recognition that at least some of those aboard vessels may reasonably expect a degree of privacy. Special

tory authority for and fourth amendment reasonableness of the stop and search of a large sailboat off Miami. The boat was first sighted outside the three-mile territorial limit and was intercepted about 2.8 miles from the Florida coast. Recognizing the "substantial distinction between a landlocked vehicle and a nautical vessel" for fourth amendment purposes and the historical latitude accorded in situations involving the latter, we held that 19 U.S.C. §1581(a) provides constitutional authority for customs officers, even in the absence of "a modicum of suspicion," to stop vessels for document checks in "customs waters."

The facts of the instant search, however, raise aspects of an issue not addressed in *Freeman*. "Customs waters" are defined in 19 U.S.C. §1401(j), as to American vessels, as "the waters within four leagues [12 nautical miles] of the coast of the United States." Section 1581(a), on the other hand, purports to grant authority to "board . . . any vessel or vehicle at any place in the United States or within the customs waters." (emphasis added). Because the *Freeman* stop occurred so clearly within customs waters, there was no need to determine to what degree the fourth amendment may place geographical limitations on stops made pursuant

characteristics of boats, as of autos, have led courts to treat them differently, however, from houses and offices in fourth amendment analyses, *Carroll*, *supra*; *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 567, 38 L.Ed.2d 467 (1974), though we have lately distinguished boats from cars for certain purposes. *United States v. Freeman*, 579 F.2d 942 (5th Cir. 1978); *United States v. Ingham*, 502 F.2d 1287, 1290 (5th Cir. 1974).

to section 1581(a). On the facts at bar, however, we must determine whether *Freeman* or a more restrictive rule governs stops which occur within the coastline, coastwise of "customs waters." We hold that, at least as to vessels initially sighted within customs waters, the fourth amendment does not prohibit document stops in the absence of suspicion, reasonable suspicion, or probable cause.

We begin our analysis by noting that under *Freeman* the officers could have stopped Whitaker's yacht when it was first sighted out in customs waters, even absent the indicia that reasonably aroused their suspicions. The officers chose instead to exercise their discretion in a more restrained fashion, investigating further by the computer check. By the time these results reached them, the yacht had passed into inland waterways, technically beyond the "customs waters" dealt with in *Freeman*. All of the considerations dictating our finding that the *Freeman* stop was reasonable and thus not prohibited by the fourth amendment remained present, however. The difficulty of policing the ocean frontiers, the impracticality of stopping vessels at a designated point in the water, the brief and routine nature of the detention, and the broad powers historically granted to customs officials — these factors continue to counsel a finding that the officers acted reasonably, and thus constitutionally, in exercising their statutory authority to detain the yacht for a simple document check.

It may be that had the officers initially sighted this vessel on inland waterways which are frequented by many vessels having no apparent customs connections, this balance would have been struck differently.³ On the facts of this case, however, we need not address this more complex issue. Instead, we simply hold that 19 U.S.C. §1581(a) provides sufficient and constitutional authority for document checks of vessels sighted in customs waters.

Having determined that the officers had the right to board the yacht and thus the right to be in a position to have a "plain view" of the marijuana residue on the deck, we find that they had probable cause for believing that illegal smuggling was occurring. If exigent circumstances be required,⁴ they are present here as well. We think the better view of the automobile line of cases is that they rest on a conclusion that a "diminished

³ For instance, in *United States v. Williams*, 544 F.2d 807 (5th Cir. 1977), we ruled that, absent warrant or probable cause, an apparently unseaworthy houseboat moored in a marina four miles from the open seas was insufficiently connected with customs concerns for a legitimate boarding and search under §1581(a). We note in addition that the Ninth Circuit has applied *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), to restrict occasions for §1581(a) vessel searches. *United States v. Stanley*, 545 F.2d 661, 667 (9th Cir. 1976), cert. denied, 436 U.S. 917, 98 S.Ct. 2261, 56 L.Ed.2d 757 (1978). See also *United States v. Tilton*, 534 F.2d 1363, 1366 (9th Cir. 1976).

⁴ See *United States v. Fogelman*, 581 F.2d 1167, 1171-72 (5th Cir. 1978) (both probable cause and exigent circumstances required for valid warrantless search of car); *United States v. Weinrich*, 586 F.2d 481, 491-94 (5th Cir. 1978) (upholding boat search upon a finding of probable cause and exigent circumstances).

expectation of privacy" attends the use of cars. Many of the features identified in *United States v. Chadwick*, 433 U.S. 1, 12-13, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), as contributing to that lessened expectation apply equally to boats. Large areas of vessels, big and small, are within the plain view of anyone passing close by; boats are required to be registered, and various other regulatory and safety restrictions must be obeyed. Boats that venture into customs waters are subject to a boarding for a document check and safety inspection,⁵ while any vessel reasonably thought to have come from foreign waters must submit to a full customs search. As with cars, however, persons might have a heightened expectation of privacy as to certain areas of a boat. The living quarters of the crew on an oceangoing tanker, a locked compartment on the bridge of a boat, are possible examples that come to mind. It may be that persons have such a heightened expectation as to personal effects placed in the cabin of a sizeable yacht. Because the record has not been developed along these analytic lines, however, we cannot be sure whether this particular cabin should properly be analogized to closed living quarters or to the more public passenger areas of a car. The undoubted presence of exigent circumstances which at times render valid even searches of

⁵ *United States v. Freeman*, 579 F.2d 942 (5th Cir. 1978). Under *United States v. Odom*, 526 F.2d 339 (5th Cir. 1976), a document check may validly include entry of the hold of a cargo vessel to verify the numbers carved in the main beam.

areas of relatively great privacy⁶ allows us to uphold this search without regard to a thoroughgoing *Chadwick* analysis.

II. Testimony about Silence Following Miranda Warning.

In questioning one of the arresting customs officers at trial, the prosecutor inquired whether the defendants had made any statements following *Miranda* warnings. The officer first responded that, "For all practical purposes they made no statements." but then went on to testify about certain statements the defendants had made after receiving their rights. They each had stated that a fourth person on the boat was only a hitchhiker and was not involved. After direct examination was concluded, defense counsel requested a mistrial, claiming that the testimony violated defendants' fifth amendment privilege against self-incrimination. The trial judge ordered the testimony stricken from the record and gave the jury a cautionary instruction. There was no other reference to silence during the trial. On cross-examination, the customs officer even testified about additional statements: Whitaker had said the boat belonged to him and not the Larson whose name

⁶ See, e.g., *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (warrantless search of house justified because of exigent circumstances during pursuit of robbery suspect); *United States v. Carter*, 566 F.2d 1265 (5th Cir.), cert. denied, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978) (exigent circumstances may justify entry of a house by an officer with warrant before he has given occupants an opportunity to respond to his notice of authority and purpose).

turned up in the computer check; Whitaker had also claimed he found the marijuana on an island in the Bahamas.

Though due process forbids the prosecution to use evidence of a defendant's post-arrest, post-*Miranda* warning silence, either for substantive or impeachment purposes, *Doyle v. Ohio*, 426 U.S. 610, 76 S.Ct. 2240, 49 L.Ed.2d 91 (1976), we have found some violations of this principle to be only harmless error. See, e.g., *United States v. Sklaroff*, 552 F.2d 1156 (5th Cir. 1977), cert. denied, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *United States v. Davis*, 546 F.2d 583 (5th Cir.), cert. denied, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977). In *Sklaroff*, for instance, the witness spontaneously blurted out that the defendant had declined to make a statement after the warnings. Cautionary instructions were given, no further reference to the silence was made, and the evidence of guilt was overwhelming. Our case is similar. Though the witness' reference to silence was in response to a prosecutorial question, the prosecutor may well have expected the witness to respond by recounting the statements actually made. The witness' reference to silence was a misstatement — as became clear in his further testimony. Cautionary instructions were given, and the prosecutor did not "focus on" or "highlight" the reference to silence in any way. See *United States v. Davis*, *supra*. In view of our finding that the marijuana was properly admitted, the evidence of guilt on at least the possession count was overwhelming. We hold, therefore, that this isolated statement was harmless beyond a reasonable doubt.

Appellant Fitzpatrick finally complains about the customs officer's testimony that Whitaker said they found the marijuana on the Bahamas. He argues that, as to him, this evidence is inadmissible hearsay and also, since Whitaker did not take the stand, a violation of his right to confront the witness against him under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). No objection was made at trial, however, and we need not address the issue on appeal because it is relevant to Fitzpatrick's importation conviction only. His sentence on that count is to run concurrently with his sentence on the possession count, his conviction for which is not challenged except as to the fourth amendment and *Doyle* issues addressed above. Exercising our discretion, we decline to reach the merits of the challenge to the importation count.

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurring in part II and in the result reached in part I:

I concur in part II of the opinion. However, I find the language in part I unnecessarily expansive and I reach the same result by navigating a straitened channel.

The broad language of the opinion in *United States v. Williams*, 5 Cir. 1977, 544 F.2d 807, is not, as is suggested by the majority, restricted to "an apparently unseaworthy houseboat moored in a marina four miles from the open seas." The court there held that the boarding of

a vessel "about which there is no apparent customs concern or suspicion of law violation" must be premised on a warrant, or probable cause. "Suspicious circumstances" were found insufficient to justify a document check.

The opinion in *United States v. Freeman*, 5 Cir. 1978, 579 F.2d 942, dealing with the authority of customs officials to board a vessel in customs waters, is equally categorical in its assertion that not even "a modicum of suspicion" is required to justify detention and boarding of a United States vessel under 19 U.S.C. §1581(a). *Williams* is not mentioned in the later opinion.

Because the language of these cases is inconsistent, although their actual results may be rationalized by pointing to factual differences, we should directly confront the question of their relationship when it becomes unavoidable. Such review is unnecessary here. Even assuming the stringent standards of *Williams* apply, the boarding of the defendants' yacht was justified by probable cause coupled with exigent circumstances once the customs officers pulled alongside and smelled marijuana. The same facts, added to the marijuana residue found in plain view, validated the subsequent search. It is on that basis that I would hold the stop, boarding, and search of the vessel constitutionally permissible, and would affirm the denial of the defendants' motion to suppress.

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APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 6, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-5526 — U.S.A. v. GERALD RANDALL WHIT-
AKER and EDWARD JOSEPH
FITZPATRICK

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ Sally Hayward
Deputy Clerk

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APPENDIX "C"

STANDARD & POOR'S
INDUSTRY SURVEYS

A-L
Volume No. 1
OCTOBER 1978

BOATING

With demand for marine products expected to be relatively stable, but prices up, a sales gain of about 8% to \$6.4 billion seems likely in 1978 for the pleasure boating industry. Expenditures in 1977 rose 11% to \$5.92 billion, from the \$5.33 billion of the prior year. However, the gain was primarily the result of higher prices, since unit sales declined in a number of areas.

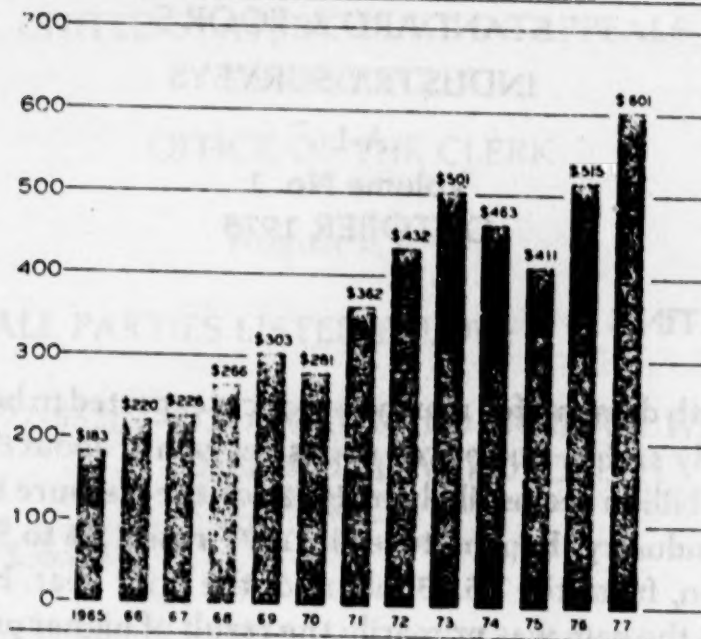
Annual estimated volume of activity for boats, motors, and trailers (In thousands)					
Year	Motor Unit Sales	Outboard Motors In Use	Outboard Boats Sold	Inboard/ Outdrive Boats Sold	Boat Trailers Sold
1977	462	7,760	336	84	276
1976	468	7,700	341	80	285
1975	435	7,649	328	70	255
1974	545	7,595	425	70	325
1973	585	7,510	448	78	330
1972	535	7,400	375	63	265
1971	495	7,300	278	44	220
1970	430	7,215	276	43	213
1969	510	7,101	310	49	235
1968	500	6,988	283	42	200
1967	444	6,904	260	36	160

Source: Boating Industry Association

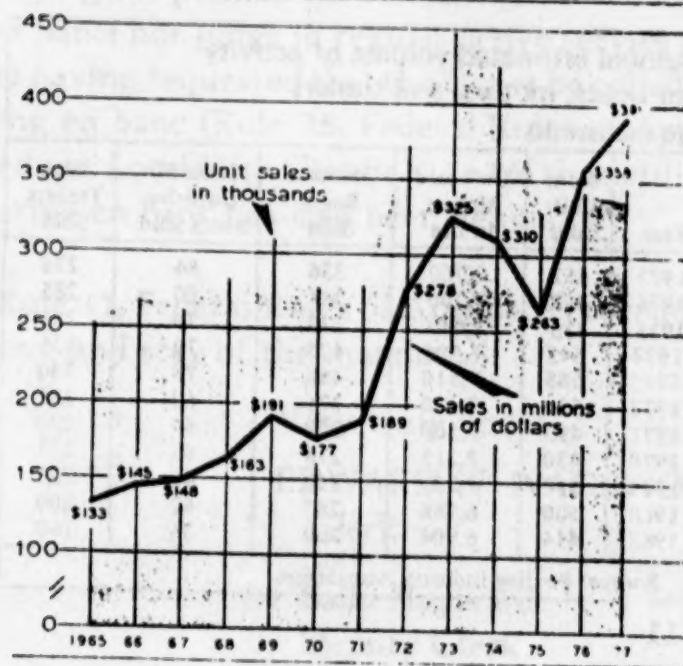
14a

OUTBOARD MOTOR SALES

(In millions of dollars)



OUTBOARD BOAT SALES



15a

The rate of inflation in this field in 1977 was considerably above the national average, reaching as much as 18% in some key product areas. Revenues were also inflated by higher costs of operating boats; fuel, insurance, service, repairs, and fees were all sharply higher, even though there were probably fewer actual miles logged by boats on U.S. waterways during 1977 than in many previous years. Also aiding the increase in revenues were the installation of extra equipment, such as electronics gear, air conditioning and pollution-control devices, and higher sales of used equipment at higher prices.

During 1977, 336,000 outboard boats were sold. This was 5,000 (1.5%) fewer than in the preceding year and over 100,000 below the peak year of 1973. However, the dollar volume of new outboard boats increased 9.3% to \$391.4 million, from \$358.1 million in 1976. The average sales price per unit was \$1,165, up \$115 from 1976. It has been noted by the trade that, with prices for small- and medium-size boats constantly increasing, the industry is in danger of pricing itself beyond the means of a large segment of its blue-collar market. There were definite indications of this in 1977.

Sales of outboard motors reached \$600.6 million in 1977, up 16.7% from the record of \$514.8 million of 1976. Unit sales slipped 1.3% to 462,000 motors, from 468,000; average horsepower increased to 44.4, from 42.1; and the average unit price rose to \$1,300, from \$1,100. The \$200 increase in the average price must be considered in light of the jump in average horsepower. There is no doubt that interest in the more powerful

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engines is strong, despite a sharp increase in the sale of small motors and continued expansion in the sale of inboard-outboard motors. (Sales of inboard-outboard boats rose 4,000 units in 1977 to 84,000). A large share of the small horse-power motors sold in 1977 went to sailboat owners.

The sailboat industry accounted for 15% of overall (power and sail) boating industry sales in 1977, with \$890 million spent at retail for sailboats and various accessories and hardware. Sailboats could account for 20% of the market by 1980, according to some industry sources. About 148,000 new sailboats of all types were bought in 1977.

Companies in the industry should experience a rather cyclical business that is most closely correlated with factory employment patterns. Since manufacturing operating leverage of products, such as engines, is fairly large, industry profits should expand substantially during economic upswings. On the other hand, profits tumbled sharply in 1974 and 1975 in reaction to the economic downturn and concern about fuel availability.

OUTBOARD MARINE, with its *Johnson* and *Evinrude* engines, is the largest producer of outboard engines. BRUNSWICK is a close second, with its *Mercury* and *Mariner* lines, and CHRYSLER is a distant third. Among the large diversified companies engaged in the manufacturing of boats with outboard motors are AMF, BANGOR PUNTA, CHRIS-CRAFT, CONROY, and WHITTAKER.

APPENDIX "D"

FLORIDA DEPARTMENT OF NATURAL
RESOURCESCROWN BUILDING
TALLAHASSEE, FLORIDA 32304

Code	County	Boats Registered in 1977-78		Grand Total
		Pleasure Boats	Commercial Boats	
11	Alachua	5,984	266	6,250
12	Baker	676	3	679
13	Bay	8,236	833	9,069
14	Bradford	1,293	16	1,309
15	Brevard	15,199	506	15,705
16	Broward	25,458	583	26,041
17	Calhoun	753	24	777
18	Charlotte	5,167	155	5,322
19	Citrus	5,118	606	5,724
20	Clay	2,630	167	2,797

17a

Code	County	Pleasure Boats	Commercial Boats	Grand Total
21	Collier	6,964	608	7,572
22	Columbia	2,066	24	2,090
23	Dade	37,373	1,026	38,399
24	DeSoto	842	17	859
25	Dixie	879	216	1,095
26	Duval	22,570	722	23,292
27	Escambia	12,039	468	12,507
28	Flagler	671	39	710
29	Franklin	628	904	1,532
30	Gadsden	1,389	96	1,485
31	Gilchrist	590	23	613
32	Glades	588	147	735
33	Gulf	1,168	209	1,377
34	Hamilton	326	2	328
35	Hardee	970	6	976
36	Hendry	1,046	110	1,156
37	Hernando	1,174	66	1,780
38	Highlands	3,561	111	3,672
39	Hillsborough	26,578	578	27,156

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Code	County	Pleasure Boats	Commercial Boats	Grand Total
40	Holmes	868	5	873
41	Indian River	3,087	246	3,333
42	Jackson	2,304	52	2,356
43	Jefferson	401	10	411
44	Lafayette	268	1	269
45	Lake	8,523	435	8,958
46	Lee	15,368	1,226	16,594
47	Leon	7,782	360	8,142
48	Levy	1,204	241	1,445
49	Liberty	434	21	455
50	Madison	602	3	605
51	Manatee	8,026	244	8,270
52	Marion	7,502	357	7,859
53	Martin	4,602	208	4,810
54	Monroe	8,121	2,749	10,870
55	Nassau	1,554	129	1,683
56	Okaloosa	7,503	294	7,797
57	Okeechobee	2,149	183	2,332
58	Orange	19,198	212	19,410
59	Osceola	2,218	172	2,390

19a

20a

Code	County	Pleasure Boats	Commercial Boats	Grand Total
60	Palm Beach	18,029	526	18,555
61	Pasco	7,014	203	7,217
62	Pinellas	26,622	1,044	27,666
63	Polk	15,824	465	16,289
64	Putnam	3,634	437	4,071
65	St. Johns	1,918	207	2,125
66	St. Lucie	3,051	271	3,322
67	Santa Rosa	4,550	273	4,823
68	Sarasota	11,682	373	12,055
69	Seminole	5,722	219	5,941
70	Sumter	1,949		2,082
71	Suwannee	1,131	49	1,180
72	Taylor	1,317	248	1,565
73	Union	288	2	290
74	Volusia	9,560	594	10,154
75	Wakulla	1,056	261	1,317
76	Walton	1,605	99	1,704
77	Washington	1,032	33	1,065
99	Out-of-State	410,174	452	452
	State, County & City Owned boats	2,500	21,568	431,742
	Miscellaneous	22,144	3,237	25,381
	TOTALS	434,818	24,805	459,623

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APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1978

 No. 77-5526

D. C. DOCKET NO. 77-90-CR-SMA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GERALD RANDALL WHITAKER
and EDWARD JOSEPH FITZPATRICK,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

Before COLEMAN, GEE and RUBIN, Circuit Judges.

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JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

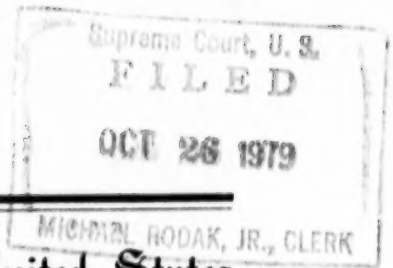
ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the District Court in this cause be, and the same are hereby, affirmed.

April 4, 1979

Rubin, Circuit Judge, concurring in part.

ISSUED AS MANDATE:

No. 79-380



In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD RANDALL WHITAKER AND EDWARD
JOSEPH FITZPATRICK, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-380

GERALD RANDALL WHITAKER AND EDWARD
JOSEPH FITZPATRICK, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioners contend that the admission of marijuana at their trial violated their rights under the Fourth Amendment.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of unlawful importation of 9,098 pounds of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1), and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Whitaker was sentenced to concurrent terms of four years' imprisonment and a special parole term of two years. Petitioner Fitzpatrick was sentenced to concurrent

terms of three years' imprisonment and a special parole term of two years. The court of appeals affirmed (Pet. App. 1a-11a).

1. On December 24, 1976, while on marine patrol, United States Customs Service officers spotted a 42-foot boat two or three miles offshore approaching Miami, Florida. As the boat entered Biscayne Channel, it was observed to be pushing a lot of water, riding low in the water and throwing a big bow wake, all indicating to the officers that the boat was heavily laden. No name or home port was displayed on the stern or elsewhere. A card bearing Florida registration numbers was visible in one window. The practice of using temporary numbers is usually reserved to new boat dealers, and this vessel appeared within the experience of the officers to be approximately 15 years old. The windows were closed and the curtains drawn.

Their suspicions aroused, the officers radioed for a computer check on possible offenders connected with the Florida registration numbers. As they awaited a response, the customs officers continued to follow the boat, and saw that it appeared to be handling sluggishly with little or no waterline visible, further indications of a heavy load. The computer check revealed four possible "hits" under the name of William Lawson, whereupon the officers decided to board the vessel.

The officers pulled alongside the boat, announced themselves, and sought permission to board for an identification check. Once alongside the boat one of the officers smelled a strong odor and a second officer thought he smelled marijuana. When the officers boarded and requested the boat's registration, petitioner Whitaker merely shrugged. Another officer picked up marijuana residue observed on the deck. Upon opening the cabin door, the officers saw a large quantity of marijuana.

2. The majority below sustained the search and seizure in this case on the following line of reasoning. Since the boat "was first sighted out in customs waters,"¹ Customs officers could have stopped it then, pursuant to 19 U.S.C. 1581(a),² "even absent the indicia that reasonably aroused their suspicions" because, "at least as to vessels initially sighted within customs waters, the fourth amendment does not prohibit document stops in the absence of suspicion, reasonable suspicion, or probable cause" (Pet. App. 5a). See *United States v. Freeman*, 579 F.2d 942 (5th Cir. 1978). It followed therefore that the actual stop after the computer check and after the boat was within inland waters constituted an act of "discretion [exercised] in a more restrained fashion" (Pet. App. 5a), and within the reasonableness standard of the Fourth Amendment.

In our view, this analysis is sound, but the validity of the present search does not depend on that analysis alone. Before boarding the boat, the officers saw that it was riding low in the water, throwing an inordinate wake, and handling sluggishly, that it bore neither a name nor home port, and that its registration numbers were displayed in an unusual way. As the court of appeals stated, these facts "reasonably aroused [the customs officers'] suspicions" (Pet. App. 5a), and they came alongside petitioners' vessel and stopped it. This Court has held that a reasonable founded suspicion of illegal activity justifies a limited investigatory stop, and that a full search may be undertaken if the stop reveals facts amounting to probable cause. *United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 884 (1975).

¹"Customs waters" are those waters up to 12 miles offshore. See 19 U.S.C. 1401(j).

²19 U.S.C. 1581(a) (see Pet. 2-3) authorizes customs officers to make documentary checks of foreign and domestic vessels within the United States or its customs waters. It does not require probable cause or articulable suspicion.

Once alongside petitioners' boat, the officers detected a strong odor of marijuana (Pet. App. 2a-3a). At this point, as Judge Rubin's concurring opinion points out, the customs officers had an independently sufficient legal basis to board the ship (Pet. App. 11a):

* * *the boarding of defendant's yacht was justified by probable cause coupled with exigent circumstances once the customs officers pulled alongside and smelled marijuana. The same facts, added to the marijuana residue found in plain view, validated the subsequent search.

The cases relied upon by petitioners do not assist them. In *United States v. Stanley*, 545 F. 2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978), although the Ninth Circuit declined to uphold the search of a vessel on the basis of 19 U.S.C. 1581(a) absent any articulable suspicion of a customs violation, it upheld the search as a border search where the vessel was seen departing the United States nine miles offshore. Here, although the court of appeals did not decide whether the search was valid as a border search (Pet. App. 3a), the boat was sighted approximately three miles offshore, approaching the United States, thus supporting, in our view, a reasonable conclusion of a border crossing. In any event, as noted, the officers approached the vessel upon reasonable suspicion and boarded it upon probable cause, both of which were absent in *Stanley*. The officers' conduct here comports with the standards announced in *United States v. Brignoni-Ponce*, *supra*, regardless of whether it may also have qualified as a border search (and, as noted, regardless of whether the court of appeals' majority was correct in upholding it solely on the basis of 19 U.S.C. 1581(a)).

Nor does the decision here conflict with the Ninth Circuit's holding in *United States v. Tilton*, 534 F. 2d 1363 (1976). *Tilton* was remanded for a determination whether customs officers could reasonably have believed that the boat had crossed the border.

Indeed, ruling on facts very similar to those of the instant case, the Ninth Circuit, after *Tilton*, ruled in *United States v. Odneal*, 565 F. 2d 598, 601 cert. denied, 435 U.S. 952 (1977), that, despite lack of evidence of any border crossing, a customs officer who noted that a yacht appeared to be riding low in the water, displaying no name nor home port, and carrying temporary dealer's numbers, had a "founded suspicion that the vessel might be carrying contraband" (565 F. 2d at 601) sufficient to subject it to a "brief investigatory stop" (*ibid.*) and that, once alongside, a strong odor of marijuana supplied probable cause for a boarding and search.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979